No. 80-1743

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, and THE NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

—v.—

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., NYDIA I. DIAZ, JAMES MICHAEL HIDALGO, WILFRED CEBOLLERO, ANDRE LOPEZ, REINALDO SALGADO, DENISE SANTOS, DEBORAH HOLMES and PAMELA OBEY, individually and on behalf of all those similarly situated,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does statistical evidence demonstrating significant disparate impact give rise to a presumption of discrimination and satisfy plaintiffs' burden of establishing a *prima facie* case under Title VII of the Civil Rights Act of 1964, as amended?

2. Did the Court of Appeals err in finding petitioners' selection procedures not valid or job-related in violation of Title VII?

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STATUTES, RULES AND REGULATIONS:

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. . . . . .2, *passim*.

Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (1978). . . . . .3, *passim*.

42 U.S.C. § 1983 2

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STATEMENT

Petitioners herein are the New York City Civil Service Commission, Department of Personnel and Police Department. They seek a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed in part and reversed in part an order of the United States District Court for the Southern District of New York and remanded for entry of a new decree.

Plaintiffs, black and Hispanic applicants for the position of New York City Police Officer, challenged the written portion of Police Officer Examination No. 8155 as discriminatory in violation of 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* The Court of Appeals held that defendants' selection procedures had a disparate impact and were not valid or job related in violation of Title VII.

STATEMENT OF THE CASE

This case involves Exam No. 8155, a written test for the entry level position of police officer in the New York City Police Department ("NYPD"). Plaintiffs, black and Hispanic applicants, charged that the examination had a disparate impact on minorities. Both the District Court and the Court of Appeals found that the test was discriminatory and not job related in violation of Title VII.

Defendants seek review of the Court of Appeal's holding that plaintiffs may establish a *prima facie* case of employment discrimination through statistical evidence and its finding that the examination failed to meet the job relatedness requirement that would allow for its use despite its disparate impact on minorities.

Defendants administered the 100-question multiple choice test to more than 36,700 applicants for the entry-level police jobs. (App. A, at 8a).[1] Of those applicants, 11,381 or 30.9% were identified as blacks or Hispanics.[2] *(Id.)*.

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1 Unless otherwise indicated, numbers in parentheses preceded by "App." refer to the Appendices annexed to defendants' Petition for Writ of *Certiorari*; the numbers preceded by "T." refer to relevant pages in the original trial transcript.

2 Without citation to the record, defendants assert that they had conducted "an intensive recruitment effort directed at attracting protected group members." (Petition, at 9). Presumably this is meant to infer that this particular testing cycle atypically inflated the minority applicant pool. Putting aside the relevance of this assertion, it is

Following the receipt of the results of the test, defendants determined that only those who achieved a score of 94 or higher on the test would be placed on an eligible list, ranked by score. Ninety-four was chosen as the cut-off although defendants had not determined and did not know the score at which a person is qualified to be a police officer. (T., at 37; also see T., at 94). It was chosen as the passing score for no better reason than that the defendants believed that they required an eligible list containing 12,000 applicants in order to fill available positions in the next four years, and the score of the applicant ranked 12,000th was 94.[3] (App. A, at 8a).

White applicants passed at much higher rates than minority applicants, the Court found.[4] While 45.9% (9,094) of those applicants identified as white passed with a score of 94 or higher, only 17% (1,046) of the black applicants, and 20.5% (1,074) of the Hispanic applicants did so. (App. A, at 8a). Put another way, although minority applicants constituted at least 30.9% of those who took the test, they constituted only 15.4% of those who passed. *(Id.)*.

The District Court found that plaintiffs had established a *prima facie* case of employment discrimination. Applying the standard deviation analysis adopted by this Court in *Hazelwood School District v. United States,* 433 U.S. 299, 308 n.14 (1977),[5] as well as, the "Uniform Guidelines on Employee Selection Procedures," 29 C.F.R. Part 1607 (1978), developed

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important to note that there is no evidence in the record of any recruitment at all. Indeed, what is worth noting is that the applicant pool was almost 31% minority and that the District Court found that the relevant qualified labor pool was 34.9% minority. (App. C, at 78a).

3 Including all of the applicants who scored 94 or above, the eligible list ultimately contained 13,749 applicants. (App. A, at 8a). This was due to a bunching phenomenon that occurred at the score of 94. *(Id.)*.

4 These disparities, the District Court found, perpetuated under-representation of minorities in the NYPD. (App. C, at 80a). As of 1978, although the relevant labor pool was at least 30% minority, the NYPD had a police force that was 8.9% black and 3.8% Hispanic. *(Id.)*.

5 *Also see, Castaneda v. Partida,* 403 U.S. 482, 496 n.17 (1977).

by the Equal Employment Opportunity Commission ("EEOC Guidelines"), the District Court held that Exam No. 8155 had a disparate impact on minorities of devastating proportions.

The disparity between the number of blacks and Hispanics who passed the test and the number who would have been expected to pass a non-discriminatory test constituted 39 standard deviations. This, the District Court found, is a difference that is statistically significant, which could not have occurred by chance. (App. C, at 80a). As this Court indicated in *Hazelwood,* "a fluctuation of more than two or three standard deviations would undercut any hypothesis that [hiring] decisions were being made randomly with respect to race . . . ." 433 U.S. at 311 n.17.

In addition, the selection rate being "less than four-fifths (or 80%) of the rate of the group with the highest rate," under Section 4D of the EEOC Guidelines, this was clear evidence of disparate impact violative of Title VII. (App. C, at 79a-80a).

The District Court found the test to be invalid and not job related, citing defendants' failure to appropriately validate the test and their seriously flawed test development process.

Defendants sought to justify the exam as content valid. The District Court rejected this assertion. Under the EEOC Guidelines, a test subjected to content validity must measure knowledge, skills and abilities ("KSA's") and not general traits such as aptitude and intelligence. The District Court concluded that the test measured the latter (constructs) and not the former (content), so it was more appropriately gauged under construct validation. (App. C, at 85a). Too, the EEOC Guidelines indicate that the test must not measure a knowledge or skill that an employee will learn on-the-job, and the District Court found that "applicants must secure training in substantially all of the designated tasks." (App. C, at 84a). Further, under the EEOC Guidelines, content validity "may only be utilized when the test corresponds closely to those tasks that are actually performed on the job," and defendants failed to establish that this test measured on-the-job behavior of police officers. (App. C, at 85a).

The District Court cited several reasons for having found the test to be flawed. It concluded that in preparing this discriminatory test the defendants had deviated substantially from established standards. It cited defendants' failure to follow the EEOC Guidelines, the American Psychological Association Standards, as well as those required by defendants' own guide—*Procedures*—in which defendants set out the requisites for job analysis for an examination. (App. C, at 82a). These departures, the District Court found, "fatally flawed the test's preparation and in essence reduced the effort from the required professionalism to the level of a homemade test." *(Id.)*. It pointed out that "the poorer the preparation of the test, the greater the need to demonstrate its 'manifest relationship' to the job." (App. C, at 82a).

The District Court found that the New York City Department of Personnel staffperson who developed the discriminatory test, "disclaimed expertise in both testing and police work." (App. C, at 71a). The most fatal flaw of all in the Court's view was that she "lost control of various critical aspects of the test's preparation." (App. C, at 82a). For example, although defendants asserted that this was a content valid test that was meant to measure the KSA's needed to do the job of police officer, the District Court found that the test maker did not know if the "KSA's identified by those with knowledge of the job actually relate[d] to a substantial portion of the job in issue." (App. C, at 83a). The District Court observed that beyond "stating what the 5 KSA's were said to be, [the test maker] could describe them no further." (App. C, at 76a). In the District Court's view, it is impossible "for the test maker to design an examination to measure work behaviors, or in this case KSA's, that she cannot explain, analyze or define." (App. C, at 83a). Indeed, this conflicted even with the defendants' own guidelines regarding job analysis for examinations:

> *Procedures* would seem to require that the test designer, not the work knowledgeable consultants, be in charge of analyzing the KSA's and work behavior in structuring the

> test. Here much of the test's preparation was done by various teams of police officers without the test maker understanding precisely what had been done.

(App. C, at 83a).

Furthermore, the District Court noted that there was no showing that the police officers who were chosen to work on the examination were "job knowledge experts," as defendants asserted. (App. C, at 72a-73a). The Court also noted that there was no exchange of ideas and concepts between the various panels of police officers who worked on examination. The extent of the flaws in the test preparation were summarized as follows by the District Court:

> The KSA's were identified by one group, questions were written by a second group, and evaluation was done by a third group. No panel was shown the basis for another panel's KSA determinations, because it was felt that the stated KSA's would be understandable to police officers without further elaboration. The KSA's were said to differentiate the good from the bad officer, but how that was done was not explained.

(App. C, at 76a).

In short, the District Court found a faulty job analysis, which is a good indication of the lack of job relatedness. (App. C at 82a). Equally as important, it also found that the examination did not test for the abilities needed to perform the job of police officer. (App. C, at 87a). The District Court, therefore, concluded that "defendants [had] failed to prove that the test has a 'manifest relationship' to a police officer's duties," and found that Title VII had been violated. (App. C, at 88a-89a).

The District Court also found that the defendants designed Exam No. 8155 "either with a deliberate intention to discriminate against blacks and hispanics or with a reckless disregard of whether the test would have that result" based on a finding "of a pattern, long continued, of discrimination against blacks

and hispanics in the hiring and promotion of police officers . . . ." (App. C, at 90a and 89a). The District Court underscored that the issue had previously been before the Court and that it had found prior exams also to have had an adverse impact on minorities. (App. C, at 89a).[6]

Despite this prior history of discriminatory tests, the District Court found not a more careful compliance with the requirements of Title VII by defendants, but rather a persistence on their part "in devising and utilizing testing procedures that continue[d] to discriminate against blacks and hispanics." *(Id.)*. Indeed, it pointed out that "during the preparation phases of the test several police officers warned the test makers that the test would disfavor blacks and hispanics." (App. C, at 90a).

Although the NYPD took the position that higher scorers possess more police-related KSA's, the District Court found "there is nothing in the record to support that presumption." (App. C, at 88a). In the District Court's view defendants' actions must be deemed "conscious and deliberate" since there was "no proof that police work [was] performed more efficiently or effectively by persons who score[d] high on this examination and its racial impact had been proven. . . ." (App. C, at 89a).

The trial court rendered its decision[7] and order on January 11, 1980. Defendants appealed timely to the Court of Appeals for the Second Circuit. On July 31, 1980, the Court of Appeals, reversing only as to the extent of the remedy war-

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6 Seven prior police tests developed by the NYPD between 1968 and 1973 have been found to be discriminatory and not job related. *Guardians Ass'n v. Civil Service Commission of The City of New York*, 431 F. Supp. 526 (S.D.N.Y. 1977), *vacated on other grounds*, 562 F.2d 38 (2d Cir. 1977), on remand, 466 F. Supp. 1273 (S.D.N.Y. 1979), *aff'd in pertinent part*, 633 F.2d 232 (2d Cir. 1980). As a result, the police force was only 12.7% minority in 1978. (App. C, at 80a).

7 The January 11 opinion was subsequently reissued in revised form on January 23. (App. C, at 76a, *et seq.*)

ranted, entered a judgment affirming the District Court's finding of Title VII violations.

The Court of Appeals was not as harsh in its criticism of the test development, and it did not believe that intentional discrimination had been at work.[8] Nonetheless, it found that by "any reasonable measure, including the standard deviation rule . . . or the four-fifths rule of the EEOC Guidelines, Exam No. 8155 had a disparate racial impact" (App. A, at 13a), and that even under a relaxed measure of job relatedness, the test was flawed and failed to pass muster.

In scrutinizing the test to determine its validity, the Court of Appeals rejected the EEOC Guidelines as the measure of test validity, but, rather, treated them simply as "expert opinion," relying on the minority view in this Court in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 449 and 452 (1975) (Blackmun, J., Concurring; and Burger, J., Concurring in Part and Dissenting in Part). (App. A, 18a-19a, 54a-55a).

Under the EEOC Guidelines, defendants would have had to subject their test to construct validation; instead, they had relied on the simpler procedure of content validation. Notwithstanding the EEOC Guidelines, the Court of Appeals found content validation to be sufficient and it subjected the test to this less stringent validation standard. (App. A, 20a, 25a).

The Court of Appeals found that defendants failed to meet one of the basic requirements of content validity—the scoring requirement—and that the test lacked reliability. It found that the improper use of rank-ordering and of the arbitrarily imposed passing score of 94, constituted invalid uses that had a significant disparate racial impact, which violated Title VII.

Contrary to what defendants would have this Court believe, the Court of Appeals found this test to be neither valid or job

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8 Basically, the Court of Appeals took note that the City's previous attempts to design a test on its own, "render[ed] somewhat questionable its apparent enthusiasm for [yet] another 'in-house' effort," but it did not feel it rose to an inference of "conscious intention or even a reckless willingness to violate the law." (App. A, at 59a n.32).

related nor a test that was developed in a "professional manner." (Petition, at 3). The Court of Appeals affirmed the District Court's findings that this was an in-house test developed by staffpersons of the NYPD and the New York City Department of Personnel with little input from any outside sources and no participation by anyone with special expertise in test preparation. (App. A, at 28a). The Court, therefore, determined that this required subjecting it to "careful scrutiny." *(Id.)*.

The Court of Appeals identified five attributes that must be met under the content validation standard to allow the use of a test despite its disparate impact: (1) that the test makers have conducted a suitable job analysis; (2) that they have used reasonable competence in constructing the test itself; (3) that the content of the test is related to the content of the job; (4) that the content of the test is representative of the content of the job; and (5) that the scoring system usefully selects from among the applicants those who can better perform the job. (App. A, at 26a).

The Court of Appeals carefully reviewed the test from the perspective of these five attributes. The decision is replete with references to the test's shortcomings. Indeed, the Court of Appeals went so far as to state that it was "a close question whether a test with the disparate racial impact of this one can be validated when its development departs in some significant respects even from reasonably attainable requirements of the [EEOC] Guidelines." (App. A, at 35a).

It found the job analysis to be one of "questionable sufficiency." (App. A, at 28a). It noted numerous weaknesses in the test construction process itself. The test "barely satisfied even [its] lenient construction of the Guidelines requirement of procedural representativeness." (App. A, at 37a). The process of question development was "haphazard." (App. A, at 29a). The defendants failed to conduct even a minimal sample testing to ensure the questions were comprehensible and unambiguous. *(Id.)*

The Court of Appeals also found that the exam only tested for three of the five basic abilities that the defendants purported were being tested. (App. A, at 25a). While two of the Circuit Judges did not find this a fatal flaw, the third Judge, concurring, disagreed. He pointed out that the exam "failed to test for human relations skills despite the City's job analysis which found, not surprisingly, that such skills constitute a significant part of police work in New York City—sufficiently important to warrant devoting 30 of the exam's 100 questions to determining whether the applicants possessed them and in what degree." (App. A, at 62a). In his view, "an exam which does not test for a skill or ability determined to constitute close to one-third of the talents required for success on the job cannot be called representative in any meaningful sense." *(Id.)*.

In short, after careful analysis of the test, the Court of Appeals, like the District Court, found that "the identification of pertinent abilities, the demonstration of their relationship to the job task, and the process of developing the questions, were flawed." (App. A, at 37a).

As the foregoing demonstrates, this was a test with a panoply of problems. Although, as indicated, the Court of Appeals gave the defendants the benefit of the doubt, "the defects [it] noted in the job analysis and the test construction are substantial enough to preclude an inference that passing scores will correlate with job performance closely enough to justify rank-ordered selections." (App. A, at 37a). In addition, citing the EEOC Guidelines, the Court of Appeals stated that "a cut off score 'should normally be set as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force.' " (App. A, at 45a). The Court pointed out that defendants merely "chose as many candidates as [the NYPD] needed, and then set the cut off score so that the remaining candidates would fail." (App. A, 46a). This arbitrarily-imposed cut off score clearly bears no demonstrable relationship to successful job performance. Rather, as defendants admit, it was based solely upon "projected manpower needs." (Petition, at 10).

Equally as important, it found a "total absence of any evidence that the exam possessed another vital feature—reliability, that is, the extent to which the exam would produce consistent results if applicants repeatedly took it or similar tests." (App. A, at 38a). As to this issue the Court stated that "[w]ithout some substantial demonstration of reliability it is wholly unwarranted to make hiring decisions, with a disparate racial impact for thousands of applicants. . . ." (App. A, at 38a-39a).

Finding disparate impact, and an absence of test validity, the Court of Appeals correctly affirmed the District Court's finding of a Title VII violation.

REASONS FOR DENYING THE WRIT

The defendants have misconstrued the findings of the Courts below in an effort to formulate issues worthy of review by this Court. However, this case presents no new factual or legal issues to warrant the granting of defendants' Petition for a Writ of *Certiorari*. Defendants here are attempting to relitigate already established law related to the standards of proof in Title VII employment discrimination cases. They assert that statistical evidence showing the discriminatory effect of selection procedures is insufficient to establish plaintiffs' *prima facie* case; and that use of discriminatory selection procedures that have been invalidated for not being job related should not be abandoned unless plaintiffs can show that an alternative selection procedure exists with a lesser racial impact.

They are wrong on both counts. Defendants ignore well-established law regarding the allocation of the burdens of proof in employment discrimination cases in an effort to press forward their claims here.

1. Statistically Significant Disparities in Pass Rates between Minorities and White Applicants Establish a *Prima Facie* Case

Defendants assert that statistical evidence is insufficient to establish a *prima facie* case of discrimination under Title VII; that disparate impact established through statistical evidence is rendered meaningless if plaintiffs have not established that the applicant pool is qualified; and that in the absence of a history of intentional discrimination statistical evidence demonstrating disparate impact is insufficient to establish a *prima facie* case. These arguments contravene the established law of this Court.

It is clear beyond cavil that statistics alone may constitute a *prima facie* case of discrimination. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 (1977) *("Teamsters"); Hazelwood School District v. United States,* 433 U.S. 299, 307-308 (1977) *("Hazelwood").* This rule has been applied to public employers. *Dothard v. Rawlinson,* 433 U.S. 321 (1977) *("Dothard"); Hazelwood.*

Both Courts below found that the plaintiffs, using defendants' own data, had established a *prima facie* case through compelling statistical evidence showing that defendants' selection procedures had had a significant disparate impact on minorities. (App. A, at 13a; App. C, at 80a). Where, as here, "gross statistical disparities can be shown, they alone . . . constitute *prima facie* proof . . . of discrimination." *Hazelwood,* 433 U.S. at 307-308; *Teamsters,* 431 U.S. at 339. Plaintiffs, accordingly, met their *prima facie* burden under Title VII.

Defendants here seek to turn the holdings in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) *("Griggs")* and *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) *("Albemarle")* on their head. They suggest that once plaintiffs have shown disparate impact they have the added burden of showing that all minority applicants who took the examination were quali-

fied to do the job. As this Court made clear in *Albemarle,* once an examination is shown to "select applicants for hire . . . in a racial pattern significantly different than the pool of applicants," it is the employer's burden to show that the examination chooses those best able to do the job. 422 U.S. at 425. Defendants failed to show that the minorities who did not pass the test were not equally qualified as those who passed.

Defendants' reliance on *Hazelwood* is simply misplaced. (Petition, at 9.) As the quote from *Hazelwood* makes clear, a *prima facie* case relying on *population* statistics requires that the population be defined to include only those with the necessary qualifications for this job. *Hazelwood,* 433 U.S. at 308 n.13. The *prima facie* case here relies on applicant-flow data and not population data, whose probative force the defendants argued in *Hazelwood* "would be firmer proof" in establishing statistical disparity and which the *Hazelwood* court agreed "would . . . be very relevant." 433 U.S. at 308 n.13. Accordingly, it is appropriately used here to establish plaintiffs' statistical case. Moreover, unlike *Hazelwood,* which involved charges of a discriminatory pattern and practice of hiring in the teacher work force of the school district, this case involves entry-level jobs that require job skills that "many persons possess or can fairly readily acquire." *Hazelwood,* 433 U.S. at 308 n.13, discussing *Teamsters.*

Similarly, *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1977) *("Beazer"),* is also inapposite. In *Beazer,* general population statistics were deemed insufficient by this Court because it found that such statistics revealed "little if anything about the racial composition of the class of [Transit Authority] job applicants. . . ." 440 U.S. at 585. Plaintiffs' statistical case here involves actual applicant statistics compiled by defendants themselves.

Assuming arguendo, however, that defendants are right—plaintiffs established that the applicant pool was qualified.

Almost 31% of the applicant pool was black and Hispanic. (App. A, at 8a). The relevant minority labor pool determined by the trial court "who by virtue of age, residence and education would be expected to be applicants for the job of police officer was 34.9% black and hispanic." (App. C, at 78a). Clearly then, the applicant pool is reflective of the qualified relevant labor pool and can be deemed to have the minimum qualifications needed to perform in this entry-level position.

Further, defendants' attempt to impose on plaintiffs the burden of proving intentional discrimination in addition to disparate impact also flies in the face of established Title VII law. No such burden exists in cases involving disparate impact. *Teamsters,* 431 U.S. at 335 n.15; *Washington v. Davis,* 426 U.S. 229, 246-247 (1976).

The Court of Appeals holding is totally consistent with the precedents of this Court. Defendants raise no issue for which *certiorari* should be granted.

2. The Decisions Below Invalidating Exam No. 8155 Were in Conformance with Title VII Law

Defendants' contention that this discriminatory, non-job related examination identified the "best qualified candidates" simply is contrary to the factual findings of the District Court as affirmed by the Court of Appeals. This factual dispute is not an appropriate issue for review.

Both Courts below found that defendants' test had a disparate impact on minorities. (App. C, at 80a; App. A, at 13a). In light of its adverse impact, each of the lower Courts rightly determined that the validity of the test was at issue. Both the District Court and the Court of Appeals found the test to be fatally flawed. (App. C, at 82a; App. A, at 37a). After careful analysis they found that defendants failed to satisfy their burden to show that this discriminatory test was used in a manner that was valid and job related. (App. C, at 88a; App. A, at 48a).

As the District Court properly found (App. C, at 88a), and the Court of Appeals agreed (App. A, at 48a) there simply is nothing to justify the use of ranking or the 94 cut off score.[9] Therefore, the Court of Appeals correctly held that the "City cannot use rank-ordering not shown to be job-related when test scores produce a disparate racial impact." (App. A, at 45a). Accordingly, the District Court enjoined the use of the test results and required the development of new, valid procedures (App. D, at 94a, 95a); and the Court of Appeals affirmed the prohibition against the use of the test and the requirement that new and valid selection procedures be developed (App. A, at 54a).

The decisions below are in conformity with this Court's precedents:

> In Griggs . . . this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." (citations omitted.)

Albemarle, 422 U.S. 425; *and see, McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *also see, Texas Department of Community Affairs v. Burdine,* ____ U.S. ____, 49 U.S.L.W. 4214, 4215 n.5 (March 4, 1981).

Accordingly, defendants err in their reliance upon *United States v. State of South Carolina,* 445 F. Supp. 1094 (D.S.C. 1977), *summarily aff'd,* 434 U.S. 1026 (1978).

In the *South Carolina* case, the District Court found that the validity study conducted of the test at issue was "adequate for

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9 Defendants also try to justify the use of rank ordering by asserting it conforms with requirements under State law. The Court of Appeals rightly found this assertion meritless—"Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice." (App. A, at 45a)

Title VII purposes." 445 F. Supp. at 1113. Moreover, it was a qualifying exam in which the cut off scores used were shown to be correlated to minimum qualifications. As a result, plaintiffs there had the burden of showing that there was an alternative practice that would achieve defendants' "business purpose equally well but with a lesser disparate impact by race." 445 F. Supp. at 1115. In the case before this Court, defendants failed to show that Exam No. 8155 was being used in a valid and job related manner. Accordingly, plaintiffs were under no obligation to prove that there were less discriminatory procedures available to defendants.

In sum, defendants failed to offer any plausible justification for the cut off score and the rank ordering. Defendants' efforts to shift the burden to plaintiffs to suggest a less discriminatory selection device was rightly found to be unavailing by the Court of Appeals.[10]

Defendants' factual issue about the validity of their selection procedure does not warrant review by this Court.

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10 Assuming that defendants are correct regarding this assertion, plaintiffs' expert Dr. James J. Fitzpatrick cited several ways defendants could have developed a less discriminatory test (T., at 467-468), and plaintiffs' expert Dr. Richard Barrett suggested alternative uses of the test results that would have had a less disparate impact (T., at 394). Furthermore, the Court of Appeals too went to great lengths to discuss other means defendants could have used to develop a less discriminatory test. (*See, e.g.*, App. A, at 39a, 43a, 44a). Indeed, taking due recognition of the defendants' use of random selection in selecting from among the 2,000 applicants at each scoring level between 94 and 97, the Court of Appeals concluded that even the City recognized "that when test scores afford no job-related basis for making selections from within a group that passed the test, random selection is appropriate." (App. A, at 44a). In short, defendants had numerous means available to them to blunt the discriminatory impact of this test, and they did not use any of them.

CONCLUSION

For the foregoing reasons, a writ of *certiorari* should be denied.

Respectfully submitted,

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